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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HECTOR RAMON AGUILAR, Defendant and Appellant.	E067738 (Super.Ct.No. 16CR-068920) OPINION

APPEAL from the Superior Court of San Bernardino County. Daniel W. Detienne, Judge. Affirmed.

John E. Edwards, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Hector Ramon Aguilar appeals after the transfer of his probation from Riverside County to San Bernardino County. Upon the transfer, the San Bernardino County Probation Department recommended additional terms and conditions of probation. Defendant objected to some of the new conditions, including the addition of an electronics-search condition. On appeal, defendant makes several arguments relating to the electronics-search condition. Specifically, defendant argues (1) the electronics-search condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*); (2) the electronics-search condition is unconstitutionally overbroad and unreasonably restricts his First and Fourth Amendment rights; and (3) the San Bernardino County Superior Court had no jurisdiction to add the electronics-search condition because no change in circumstances existed to justify the addition of this condition. We reject these contentions and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

On July 9, 2013, defendant transported methamphetamine and delayed or resisted a peace officer.

On April 9, 2014, an information was filed charging defendant and a codefendant with transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and resisting or obstructing a peace officer (Pen. Code, § 148, subd. (a)(1)).

On May 29, 2014, defendant pleaded guilty as charged.

On May 6, 2015, the Riverside County Superior Court granted defendant formal probation for a period of three years on various terms and conditions of probation.

On August 29, 2016, the Riverside County Probation Department filed a notice and motion to transfer defendant's case to San Bernardino County.

On November 10, 2016, after the San Bernardino County Probation Department verified that defendant had permanently relocated to San Bernardino County, the Riverside County Superior Court granted the motion to transfer defendant's case to San Bernardino County.

On December 16, 2016, the San Bernardino County Probation Department filed a report requesting additional terms and conditions in San Bernardino County, including that defendant "Submit to search and seizure by a [government entity] of any electronic device that you are an authorized possessor of pursuant to P[enal]C[ode section]1546.1 [subdivision] (c)(10)."

On February 8, 2017, the San Bernardino County Superior Court held a probation modification hearing. At that time, defendant's counsel objected to the imposition of the electronics-search condition as unconstitutionally overbroad, vague, and in violation of defendant's right to privacy. Defense counsel pointed out that " 'any government entity' " was a "very broad term" and it could be "anybody who works for the government." Defendant's counsel also objected to the condition as "having no nexus" to the facts of defendant's case. Defense counsel noted that the case had been transferred to

San Bernardino County and that there was no factual background reflected in the file from which one could determine whether defendant simply had drugs in his car or whether a cell phone or electronic device was used in the crime or to facilitate the transportation. The court noted that defendant had pleaded guilty to transportation of drugs, and commented that, in the court's opinion, the challenged condition was related to the crime. The court, however, modified the condition to track the language of Penal Code section 1546.1, subdivision (c)(10), to read as follows: " 'Submit to a search and seizure by a *law enforcement officer* of any electronic device that you are an authorized possessor of pursuant to Penal Code Section 1546.1[, subdivision](c)(10) *except where prohibited by state or federal law*.' " As modified, the court thereafter continued defendant on probation under various terms and conditions of probation.

On February 9, 2017, defendant filed a timely notice of appeal indicating he was appealing from the imposition of the electronics-search condition.

III

DISCUSSION

A. *Electronic Devices Search Condition Unreasonable and Overbroad*

Defendant contends the probation condition requiring him to submit his electronic devices to search or seizure by law enforcement officers is invalid under *Lent*, unconstitutionally overbroad, and in violation of his First and Fourth Amendment rights. For the reasons explained below, we disagree.

1. Applicable Principles

A grant of probation is an act of clemency in lieu of punishment. (*People v. Moran* (2016) 1 Cal.5th 398, 402.) Probation is a privilege, and not a right. A court has broad discretion to impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, . . . and generally and specifically for the reformation and rehabilitation of the probationer . . . ." (Pen. Code, § 1203.1, subd. (j); *People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*).)

A condition of probation will not be upheld, however, if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*); see *Lent, supra*, 15 Cal.3d at p. 486.) Our high court has clarified that this "test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.)

However, "[j]udicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*O'Neil*, *supra*, 165 Cal.App.4th at

p. 1356.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; accord, *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 (*Pirali*).)

We generally review the imposition of probation conditions for an abuse of discretion, and we independently review constitutional challenges to probation conditions de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).) Based on the foregoing, we address the merits of defendant's arguments below.

2. Analysis—Reasonableness

Defendant's electronics-search condition states: "Submit to a search and seizure (electronic device) by law enforcement officers of any electronic device that you are an authorized possessor of pursuant to P[enal]C[ode Section]1546.1[, subdivision](c)(10), except where prohibited by state or federal law." Defendant argues that the electronics-search condition has no relationship to the crime of which defendant was convicted, and it involves conduct that is not itself criminal. Defendant further contends that the electronics-search condition is not reasonably related to future criminality because there

was no evidence connecting his use of an electronic device to his offenses or to a risk of future criminal conduct.

The People do not address the first two *Lent* prongs—the electronics-search condition has no relationship to defendant's transportation of methamphetamine and resisting arrest offenses, and the use of electronic devices is not itself criminal. Rather, the parties agree that the validity of the electronics-search condition turns on the application of the third *Lent* factor—whether the electronics-search condition is reasonably related to preventing future criminality. (See *Olguin, supra*, 45 Cal.4th at p. 379.)

The issue of the validity of an electronics-search condition under *Lent* and its progeny is pending before our high court. (See, e.g., *People v. Ermin* (July 10, 2017, H043777) [nonpub. opn.], review granted Oct. 25, 2017, S243864; *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), review granted Dec. 14, 2016, S238210; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (*Ricardo P.*), review granted Feb. 17, 2016, S230923.) We also note that currently there is a split of authority regarding the validity of broad electronics-search conditions of probation, and those cases are also pending before the California Supreme Court. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*), review granted Nov. 29, 2017, S244650; *People v. Bryant* (2017) 10 Cal.App.5th 396 (*Bryant*), review granted June 28, 2017, S241937; *In re R.S.* (2017) 11 Cal.App.5th 239,

review granted July 26, 2017, S242387; *In re Patrick F.* (2015) 242 Cal.App.4th 104 (*Patrick F.*), review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.E.* (2016) 1 Cal.App.5th 795 (*J.E.*), review granted Oct. 12, 2016, S236628.) Until we receive further direction, we must undertake to resolve this case as best based on our construction of the applicable law.

Our colleagues in Division One of this court addressed a challenge by a defendant subjected to an electronics-search probation condition in *Trujillo*, *supra*, 15 Cal.App.5th 574, which we discuss in detail for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The defendant's crime had no relation to the probation condition, and the main issue, as here, is whether the condition was reasonably related to future criminality. The court explained that "a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality." ' [Citations.] Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' " (*Trujillo*, at p. 583, italics omitted.)

In *Trujillo*, our colleagues held the trial court did not abuse its discretion: "If the court permits this young convicted felon to avoid prison through probation despite his

violent offenses, the court has the authority to take steps to help ensure Trujillo will remain crime free and that public safety objectives are satisfied. As our high court has observed, the purpose of requiring Fourth Amendment search waivers as a probation condition is ' " 'to determine not only whether [the probationer] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant . . . .' " ' [Citations.] The trial court had a reasonable basis to conclude the most effective way to confirm Trujillo remains law abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation. This required Fourth Amendment waiver is not open-ended, it applies only during the probation period. If Trujillo is successful at his probation, the Fourth Amendment waiver will terminate and his electronic devices will again be completely private. The court made the factual determination that the electronics-search condition is necessary to provide appropriate supervision for Trujillo while he is on probation. Under *Lent* and *Olguin*, the court did not err in reaching this conclusion." (*Trujillo, supra*, 15 Cal.App.5th at pp. 583-584.) The *Trujillo* court further rejected the notion, suggested in cases such as *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*), that the Trujillo defendant's failure to use an electronic device in committing his crimes or the lack of any connection between such a device and the crimes rendered the search condition unreasonable as a matter of law. (*Trujillo,* at p. 584.)

We are persuaded by *Trujillo*'s reasoning and apply it in this case. Moreover, pending further guidance from the Supreme Court, we take the *Olguin* opinion at its word: "A condition of probation that enables a probation officer to supervise his or her charges more effectively is . . . 'reasonably related to future criminality.' " (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381.) In this case, the trial court was aware that defendant had pleaded guilty to transportation of methamphetamine and resisting arrest. The electronics-search condition at issue here allows law enforcement to supervise defendant more effectively. His conditions of probation include violating no laws; not possessing dangerous or deadly weapons; not using or possessing controlled substances unless prescribed by a medical professional; not knowingly associating with convicted felons or anyone actively engaged in criminal activity or the codefendant; and not possessing drug paraphernalia as defined in Health and Safety Code section 11364.5, subdivision (d). Searching defendant's electronic devices will assist law enforcement in determining whether he is complying with these conditions. Indeed, given the current ubiquity of electronic communications and interactions, an electronics-search condition may well be the only way for a probation officer to discover the bulk of the information relevant to potential criminality and compliance with other conditions of probation. A defendant engaged in illegal activities, for example, is much more likely to have digital photographs or communications relating to such activities stored on an electronic device than print photographs and written correspondence stored at home. The electronics-search condition is therefore reasonably related to future criminality. (See *In re P.O.* (2016) 246

Cal.App.4th 288, 295 (*P.O.*); see *J.E.*, *supra*, 1 Cal.App.5th at p. 801; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1176-1177.) We conclude the court did not abuse its discretion in ordering the condition under *Lent*, *supra*, 15 Cal.3d 481.

In support of his position, defendant relies primarily upon *Bryant*, *supra*, 10 Cal.App.5th 396, *Erica R.*, *supra*, 240 Cal.App.4th 907, and *In re J.B.* (2015) 242 Cal.App.4th 749 (*J.B.*). In all three of those cases, the court struck similar electronics-search conditions under *Lent* (*Bryant*, at pp. 404-405; *Erica R.*, at pp. 911, 913; *J.B.*, at pp. 755-756.) However, *Erica R.* and *J.B.* are distinguishable since they involved juvenile probationers, not an adult probationer like defendant. "A juvenile 'cannot refuse probation [citations] and therefore is in no position to refuse a particular condition of probation.' " (*Erica R.*, at p. 914.) Moreover, "[i]f [an adult] believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citation.]" (*Olguin*, *supra*, 45 Cal.4th at p. 379.) Here, defendant could have chosen to reject probation. However, he read and understood the probation conditions and agreed to comply with the terms and conditions of his probation. Furthermore, *Bryant* dealt with a search condition regarding a mandatory supervision case instead of probation. (*Bryant*, at p. 400.) Indeed, the court explained "Although mandatory supervision is comparable in some ways to probation, it is not identical. [Citation.] A defendant who is offered probation, for example, may refuse probation if he ' "finds the conditions of probation more onerous than the sentence he would otherwise face." ' [Citation.] In contrast to a defendant who is given probation,

however, a defendant may not refuse mandatory supervision. [Citation.]" (*Ibid*.) Therefore, defendant's reliance on *Bryant*, *Erica R.*, and *J.B.* is unavailing.

Furthermore, we disagree with the reasoning of *Bryant*, *supra*, 10 Cal.App.5th at page 404, *J.B.*, *supra*, 242 Cal.App.4th at page 756, and *Erica R.*, *supra*, 240 Cal.App.4th at page 913 because they require a showing that the defendant has used or is likely to use electronic devices for criminal acts. This requirement goes beyond the third *Lent* prong as interpreted by *Olguin*, *supra*, 45 Cal.4th 375. Although we agree that *Olguin* does not "compel[ ] a finding of reasonableness for every probation condition that may potentially assist a probation officer in supervising a probationer" (*People v. Soto* (2016) 245 Cal.App.4th 1219, 1227), *Olguin* does not require a showing that the method of supervision is likely to be particularly effective for the specific defendant at issue. Effectiveness in general is sufficient.

Olguin implies, however, that a probation condition premised on effective supervision may be unreasonable if it imposes an undue hardship or burden. (*Olguin*, *supra*, 45 Cal.4th at p. 382.) Defendant emphasizes the broad intrusive nature of the electronics-search condition, the invasiveness of any such searches, and the consequent burden on his privacy interests. (See generally *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*).) We disagree that such a burden makes the electronics-search condition unreasonable. In our view, the electronics-search condition (and consequent burden) is akin to the standard three-way search condition—of a defendant's person, residence, and vehicles—routinely imposed as a condition of probation and required by

regulation as a condition of parole. (See, e.g., *People v. Ramos* (2004) 34 Cal.4th 494, 505-506; *People v. Burgener* (1986) 41 Cal.3d 505, 532, disapproved on another ground in *People v. Reyes* (1998) 19 Cal.4th 743, 753; *In re Binh L.* (1992) 5 Cal.App.4th 194, 202-203.) One appellate court recognized that a computer hard drive is the digital equivalent of its owner's home in terms of the breadth of private information involved. (*People v. Michael E.* (2014) 230 Cal.App.4th 261, 277, citing *United States v. Mitchell* (11th Cir. 2009) 565 F.3d 1347, 1351.) It follows that, just like a defendant's home, a computer hard drive is properly and reasonably the subject of a search condition. Defendant has not shown the trial court's imposition of the electronics-search condition encompassing such digital information was unreasonable or an abuse of discretion.

3. Analysis—Unconstitutionally Overbroad

As noted, defendant also challenges the electronics-search condition as unconstitutionally overbroad and because it infringes on his First and Fourth Amendment constitutional rights. We disagree.

" 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*Pirali*, *supra*, 217 Cal.App.4th at p. 1346.) Here, the

record reflects some evidence of the legitimate purpose of the restriction, as we have discussed above: preventing future criminality by promoting effective supervision. The condition may place a burden, in the abstract, on defendant's general right to privacy based on the possibility of a search of his electronic devices. But, as a defendant under probation supervision, his privacy rights are "diminished," i.e., they may more readily be burdened by restrictions that serve a legitimate purpose. (See *Nachbar*, *supra*, 3 Cal.App.5th at p. 1129; *J.E.*, *supra*, 1 Cal.App.5th at p. 805.) On the current record, we conclude the burden on defendant's privacy right is insufficient to show overbreadth, given the legitimate penological purpose shown for searching defendant's electronic devices.

Additionally, as our colleagues did in *Trujillo*, we reject defendant's argument that the electronics-search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley*, *supra*, 573 U.S. __ [134 S.Ct. 2473]. In *Riley*, the Unites States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley*, at p. __ [134 S.Ct. at pp. 2482-2483].) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id*. at p. __ [134 S.Ct. at p. 2489].) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Riley*, at p. __ [134 S.Ct. at p. 2493].)

In *Trujillo*, the appellate court distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) The court observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Like the defendant in *Trujillo* (*id.* at pp. 588-589), defendant does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced, without-cause, warrantless search of his residence. Here, as in *Trujillo*, the record supports a conclusion that the electronics-search condition is necessary to protect public safety and to ensure defendant's rehabilitation during his supervision period, and a routine search of defendant's electronic data "is strongly relevant to the probation department's supervisory function." (*Id*. at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [defendant's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly drawn condition." (*Id*. at p. 589.)

Defendant suggests we should follow the decisions invalidating the condition as overbroad in *Appleton*, *supra*, 245 Cal.App.4th at p. 723, *In re Malik J.* (2015) 240

Cal.App.4th 896 (*Malik J.*), *Ricardo P.*, *supra*, 241 Cal.App.4th 676, *P.O.*, *supra*, 246 Cal.App.4th 288, and *Patrick F.*, *supra*, 242 Cal.App.4th 104. These cases are distinguishable or do not support defendant's argument under the circumstances of this case.

Malik J., *supra*, 240 Cal.App.4th 896, *Ricardo P.*, *supra*, 241 Cal.App.4th 676, and *Patrick F.*, *supra*, 242 Cal.App.4th 104 each considered a juvenile probation condition requiring the minor to submit his electronic devices for warrantless searching and to provide all passwords to such devices. (*Malik J.*, at p. 900; *Ricardo P.*, at pp. 886-887; *Patrick F.*, at p. 107.) The *Malik J.* court limited the manner of the searches to take place "only after the device has been disabled from any internet or cellular connection and without utilizing specialized equipment designed to retrieve deleted information that is not readily accessible to users of the device." (*Malik J.*, at p. 906) The search condition itself survived scrutiny. (*Ibid.*) The *Ricardo P.* court concluded that although an electronics-search condition was valid under *Lent* because it was reasonably related to monitoring the minor's future criminality, the condition was overbroad in allowing the probation officer access to data that was not reasonably likely to reveal whether the minor was using drugs. (*Ricardo P.*, at pp. 886-887, 889-997.) It also rejected the minor's claim that the condition posed a risk of electronic eavesdropping based on his lack of standing to raise the issue on behalf of the third parties who were arguably affected. (*Id.* at pp. 888-889.) Likewise, the *Patrick F.* court held that the condition requiring disclosure of all of the minor's passwords was unconstitutionally overbroad because it

was not narrowly tailored to limit the impact on the minor's privacy rights and that the minor lacked standing to challenge his probation condition requiring disclosure of his passwords to electronic devices on the basis that it would result in illegal electronic eavesdropping on the third parties minor communicated with. (*Patrick F.*, at pp. 114-115.) Passwords and family member devices are not at issue here, and defendant makes no argument that the manner of searching should be limited. *Malik J.*, *Ricardo P.*, and *Patrick F.* do not support defendant's position.

The fourth juvenile case, *P.O.*, relied upon by defendant, limited an electronics-search condition to only " 'any medium of communication reasonably likely to reveal whether [the minor was] boasting about [his] drug use or otherwise involved with drugs.' " (*P.O.*, *supra*, 246 Cal.App.4th at p. 300.) Given the broader penological justification for defendant's search condition here, such a narrow limitation is unwarranted. *P.O.* is unpersuasive. We again note that defendant has not challenged the remainder of his search condition covering his person, vehicle, residence, property, and personal effects, as unconstitutionally overbroad.

Similarly, *Appleton*, *supra*, 245 Cal.App.4th 717 found a penological justification in preventing the defendant from "us[ing] social media to contact minors for unlawful purposes." (*Id*. at p. 727.) Given that limited justification, the court struck a general electronics-search condition and remanded the matter to the trial court to craft a narrower condition. (*Ibid*.) Here, the penological justification is not so limited, and *Appleton* is inapplicable. Moreover, in *Appleton*, the court rejected an electronics-search condition

on the premise that *Riley* held that police could not ordinarily search a smartphone incident to arrest, and that, absent other exigent circumstances, a warrant was required to make such a search. However, the court in *Trujillo, supra,* 15 Cal.App.5th 574, and *Nachbar, supra,* 3 Cal.App.5th 1122 disagreed with *Appleton*. We recognize that our high court has granted review in *Trujillo* and *Nachbar* pending resolution of *Ricardo P., supra,* 241 Cal.App.4th 676. Pending further direction from our high court, we continue to adhere to the views expressed in *Trujillo* and *Nachbar*, namely, that the "privacy concerns voiced in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition." (*Nachbar*, at p. 1129.)

The court in *Appleton* struck a probation condition allowing probation access to recordable media and computers based on the fact personal information may be on such devices, thus making the intrusion too broad. (See *Appleton, supra,* 245 Cal.App.4th at pp. 728-729.) As we have noted, the court in *Appleton* relied heavily on the discussion in *Riley*, about the privacy interests an individual has in his or her smartphone, to find a search warrant was required to access this and similar devices. The *Riley* court did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. (See *Riley, supra,* 573 U.S. __ [134 S.Ct. 2473].) However, the instant case does not involve an exception to the warrant clause, as was the case in *Riley*. Rather, it involves a specific probation condition imposed by the trial court that restricts the exercise of the constitutional rights of defendant, who must be supervised for rehabilitation and

prevention of crime. *Riley* is therefore inapposite since it arose in a different Fourth Amendment context. *Riley* also did not consider the constitutionality of conditions of probation, parole, or mandatory supervision. Persons on probation do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*United States v. Knights* (2001) 534 U.S. 112, 119 [probationers]; see *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted Apr. 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

While searches involving electronic devices may raise unique issues of privacy not found in searches of these more traditional categories, we see no need to depart from our well-established treatment of search conditions whenever the condition implicates electronic devices. As *J.E.* explained, "courts have historically allowed parole and probation officers significant access to other types of searches, including home searches, where a large amount of personal information—from medical prescriptions, banking information, and mortgage documents to love letters, photographs, or even a private note on the refrigerator—could presumably be found and read. [Citations.] In cases involving probation or parole house search conditions, we have found no instances in which courts have carved out exceptions for the same type of information [the minor] argues could potentially be on his electronics." (*J.E.*, *supra*, 1 Cal.App.5th at p. 804, fn. 6.) As we have explained, nothing in the record here justifies narrowing the challenged electronics-search condition.

We decline to follow the cases cited by defendant. These cases declined to read *Olguin* as sanctioning imposition of electronics-search conditions without evidence the probationer is likely to use his or her electronic devices or social media for proscribed activities. Based on the foregoing reasons, we conclude the electronics-search condition is not unconstitutionally overbroad and does not substantially limit defendant's First and Fourth Amendment rights.

B. *Change in Circumstance*

Defendant also argues the court acted in excess of its jurisdiction by imposing the electronics-search condition because the court's modification was not based on a change in defendant's circumstances. Specifically, defendant asserts that the transfer of supervision to San Bernardino County did not constitute a change in circumstances, and absent a change in circumstances, his probation conditions could not be modified. Defendant believes that the additional electronics-search condition not previously imposed by the Riverside County Superior Court must be stricken.

The People respond the court had jurisdiction to modify defendant's probation conditions because a change in circumstances, namely defendant's move from Riverside County to San Bernardino County, justified the modification. The People further argue that the condition was not a substantive change; it merely made explicit what was already implicit in the condition imposed by the Riverside County Superior Court. The People further assert that even if it was a substantive change, the January 2017 amendment to the

Electronic Communications Privacy Act was a change in circumstances that justified the modification.

A trial court generally has discretion in setting the appropriate terms and conditions of probation, parole, or supervised release: "In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety. [Citations.] Thus, the imposition of a particular condition of probation is subject to review for abuse of that discretion. 'As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]' [Citation.]" (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.)

Penal Code section 1203.9, subdivision (a)(1), governs the transfer of probation cases from one county to another and provides in pertinent part: "[W]henever a person is released on probation or mandatory supervision, the court, upon noticed motion, shall transfer the case to the superior court in any other county in which the person resides permanently, meaning with the stated intention to remain for the duration of probation or mandatory supervision, unless the transferring court determines that the transfer would be inappropriate and states its reasons on the record." Pursuant to subdivision (b) of Penal Code section 1203.9, "The court of the receiving county shall accept the entire jurisdiction over the case effective the date that the transferring court orders the transfer."

The procedure for transferring a case to another county is outlined in California Rules of Court, rule 4.530. (See Pen. Code, § 1203.9, subd. (f) [judicial council shall promulgate rules of court procedures for the transfer of probation cases].) Subdivision (h)(1)(B) of rule 4.530 provides: "The receiving court and receiving county probation department may impose additional local fees and costs as authorized." Further, subdivision (g) of rule 4.530 entitled "Transfer" provides in subsection (6), "Upon transfer the probation officer of the transferring county must transmit, at a minimum, any court orders, probation or mandatory supervision reports, and case plans to the probation officer of the receiving county."

Neither Penal Code section 1203.9 nor the California Rules of Court, rule 4.530 specifically address whether probation conditions can be modified upon transfer to another county.[1] Penal Code section 1203.3, subdivision (a), states "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." This section "broadly states the court's power to modify." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1100 (*Cookson*).) A defendant is subject to notice, a hearing, and reasons for the modification to be placed on the record before the modification. (Pen. Code, § 1203.3, subd. (b).)

[1] Any clarification as to whether a transfer to another county qualifies in itself as a change in circumstances that authorizes a change in probation conditions, like the ability of the receiving county to change the fees and costs, will have to come from the Legislature.

A court can modify a term of probation at any time before the expiration of that term and need not wait until a probation violation occurs. (*Cookson, supra*, 54 Cal.3d at p. 1098; see *People v. Leiva* (2013) 56 Cal.4th 498, 505.) In *Cookson*, the defendant was ordered to pay restitution for diverting construction funds at the time that his probation was granted, but the probation department set up an incorrect payment schedule resulting in insufficient funds being paid by defendant on the restitution when his probation term was set to expire. (*Cookson*, at p. 1094.) The superior court extended the time for probation in order for the defendant to be supervised while completing the payments on restitution. (*Id*. at pp. 1094-1095.)

The California Supreme Court noted that " 'An order modifying the terms of probation *based upon the same facts* as the original order granting probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it.' " (*Cookson, supra*, 54 Cal.3d at p. 1095.) Although the defendant had complied with all of the probation conditions, and the miscalculation of the monthly payments was solely the fault of the probation officer, our Supreme Court determined "the Court of Appeal correctly determined that a change in circumstance could be found in a fact 'not available at the time of the original order,' namely, 'that setting the pay schedule consistent with [the] defendant's ability to pay had resulted in defendant's inability to pay full restitution as contemplated within the original period of probation." (*Ibid*.)

Here, the People assert the change in circumstances was that defendant moved his permanent place of residence from Riverside County to San Bernardino County. The San

Bernardino County Probation Department recommended additional terms and conditions commonly used in San Bernardino County, presumably to ensure officer safety and offender compliance. The prosecutor also noted "if there's already a term recorded that they can search their home and property, it's not unreasonable, especially nowadays, if they want to look into a potential device, a handheld cell phone or IPad of some sort." The trial court explained at the hearing on the modification that the term was related to defendant's offense and that it was pursuant to the Electronic Communications Privacy Act and Penal Code section 1546.1, subdivision (c)(10).

The transfer of the instant case from Riverside County to San Bernardino County constituted a fact not available at the time of the original order. Upon transfer, defendant's probation was overseen by a new probation officer and court, with different standards of practice regarding probationers. The San Bernardino County Probation Department's suggested changes to the conditions were reasonably related to ensure officer safety and defendant's compliance and rehabilitation. The additional electronics-search term was aimed at ensuring defendant's rehabilitation. Defendant voluntarily moved to San Bernardino County and San Bernardino County is a large, spread-out county, and the largest county in the continental United States. The San Bernardino County Superior Court was entitled to consider defendant's new circumstances when the case was transferred to San Bernardino County, and to apply new conditions appropriate in supervising San Bernardino County probationers. As previously explained, the additional electronics-search condition is reasonably related to preventing future

criminality and necessary in aiding defendant's rehabilitation. (See *Olguin*, *supra*, 45 Cal.4th at pp. 379-380.) Furthermore, the condition is no more intrusive than the condition imposed in Riverside County requiring defendant to submit to immediate search of person, home, and property by a law enforcement officer.

Based on the foregoing, we conclude the San Bernardino County Superior Court had jurisdiction to modify the conditions of defendant's probation. The new additional electronics-search condition was reasonably related to the goal of maintaining supervision and safety of the officers, as well as, defendant's crime and rehabilitation.

IV

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.